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Nos. 04-277 & 04-281

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

and

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION BRIEF OF RESPONDENT EARTHLINK, INC.

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QUESTION PRESENTED

Whether the "telecommunications" component of cable modem service meets the statutory definition of a "telecommunications service" under the Communications Act by virtue of being offered: (1) for a fee, and (2) to the public.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent EarthLink, Inc. submits the following corporate information:

1. EarthLink, Inc. is a publicly traded company engaged primarily in the business of providing Internet access and related value-added services to business and residential customers nationwide. EarthLink, Inc. has no parent company and no wholly-owned subsidiaries.

2. Sprint Corporation is a publicly traded corporation that has an ownership share in EarthLink, Inc. equal to or in excess of 10 percent. There are no other publicly traded companies that have ownership shares in EarthLink, Inc. of 10 percent or greater.

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The petitions: (1) fail to assert that the court below read the statute incorrectly; (2) fail to identify any ambiguity that would justify the deferential standard of review that the petitioners seek; (3) fail to identify any conflict between the decision below and any decision of this Court or any decision of any court of appeals; and (4) fail to identify any legitimate regulatory policy that would be thwarted by the decision below. The petitions should be denied.

COUNTER-STATEMENT

1. Internet use is fast becoming as ubiquitous as the use of voice telephony. Indeed, with the recent growth of so-called "voice over Internet protocol," the standard packet-switched data transmission methods that have supported the Internet since its inception may soon represent the primary transmission medium for all types of communications, be they voice, video, or data. *See IP-Enabled Services*, 19 F.C.C.R. 4863, 4864-4868, paras. 1-5 (2004).

The Internet has been described as a "network of networks," *see* Frank J. Derfler, *How Networks Work* 187 (6th ed. 2003), made up of computers connected by transmission lines. The "intelligence" of the Internet—its ability to process, store, generate, and transform information—lies at the ends of the transmission lines in the computers that those transmission lines connect. However, it is not the individual computers at the edges of the Internet that give the medium its power. Instead, the revolutionary power of the Internet derives from the fact that those computers are all ultimately connected to one another. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997) ("The Internet is an international network of interconnected computers."). It is the transmission links that make the pieces function as a single, if amorphous, whole.

The FCC adopted the following definition of the Internet in the Declaratory Ruling at issue here:

> For purposes of this proceeding, we use the definition of the Internet that has been adopted by the Federal Networking Council: "'Internet' refers to the global information system that—(i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or

> other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein."

FCC Pet. App. at 41a n.25. The Commission below coined the phrase "cable modem service" to describe "a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access." FCC Pet. App. at 86a. The Commission's term thus includes both the transmission functions and the "high-level services layered on the communications and related infrastructure" described in its definition of the Internet. This case is about whether the transmission lines that millions of subscribers use to send and receive information over the Internet are common carrier networks, and thus fall within the authority of the Commission under Title II of the Communications Act.

2. The Communications Act states that:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20). The parties agree that "Internet access service" has both an information processing component and a transmission component. The parties also agree that the first component is an "information service" under the Communications Act. Because that definition only includes computer processing services that are provided "via telecommunications," the parties also necessarily agree that the statute compels the conclusion that the "information service"

known as Internet access service has a "telecommunications" component. *See* FCC Pet. at 17.

The issue directly decided by the Ninth Circuit in *Brand X Internet Services v. FCC*, FCC Pet. App. at 1a-39a, and the sole substantive issue raised by the FCC and the cable petitioners here, is whether the "telecommunications" that all parties agree is a component of cable modem service also meets the Communications Act's definition of "telecommunications service."

3. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Whether a given form of telecommunications is a telecommunications service is of critical importance under the Communications Act. The Act defines a "telecommunications carrier" as "any provider of telecommunications service," and further provides that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . . ." 47 U.S.C. § 153(44). Thus, the extent to which a cable modem service provider is a common carrier depends on the extent to which the telecommunications component of cable modem service meets the "for a fee directly to the public" test of the "telecommunications service" definition.

4. It is only with respect to common carriers that the Act states that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ." 47 U.S.C. § 201(a). Because they do not own transmission networks that would allow them to provide their own connections between their customers' homes and the Internet "backbone," independent Internet service providers ("ISPs") must be able to purchase transmission

services from network operators if those ISPs are to be able to provide service at all. If cable companies are not common carriers with respect to the transmission component of the "cable modem service" that they provide to millions of customers on standard terms, then they are not required under the statute to sell that transmission to independent ISPs. Today, with the exception of certain transmission sales that have been mandated by cable company merger conditions, cable companies generally do in fact refuse to sell transmission to independent ISPs.

5. ISPs have for years urged the Commission to express its views regarding the statutory classification of cable modem service. As of 2002, the Commission had had the opportunity "no less than six times in recent years" to answer this classification question. *See National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 356 (2002) (Thomas, J., dissenting in part and concurring in part). Until the Declaratory Ruling that gave rise to this case, however, the Commission declined to do so. The silence of the Commission, along with the consistent refusal of cable modem service providers to sell transmission to independent ISPs, has resulted in a de facto forbearance from the enforcement of Section 201 of the Act with respect to this cable-based transmission service, a service over which the majority of high-speed Internet connections are made in this country. *See Availability of Advanced Telecomms. Capacity in the United States,* FCC 04-208, Fourth Report to Congress (Sept. 9, 2004) at 16 (showing that cable represents 75% of over 20 million total broadband subscribers).

ISPs sought to bypass the recalcitrant Commission by invoking the Act's Section 406 authority to bring private actions in federal district court to compel the delivery of service by a common carrier on non-discriminatory terms. *See* 47 U.S.C. § 406. Those parties were met by court orders deferring action under the doctrine of primary jurisdiction.

See, e.g., GTE.Net LLC v. Cox Communications, Inc., 185 F. Supp. 2d 1141 (S.D. Cal. 2002).[1] Because the Commission refused to act, those cases languished, leaving ISPs that were denied service no meaningful judicial or administrative forum in which to press their requests for relief.

6. With the Commission refusing to acknowledge that cable broadband transmission was a common carrier service, a number of local cable franchising authorities sought to impose—as a condition of approving cable company mergers—a requirement that cable companies sell cable-based transmission to unaffiliated ISPs. Cable companies challenged that requirement in court. One such case reached the Ninth Circuit, which addressed the statutory classification of cable modem service in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The *Portland* court first determined that cable modem service is not a "cable service" under the Act, thus obviating the need for AT&T to hold a cable franchise to provide the service. *Id.* at 877. The court held, however, that in order to determine whether the franchise transfer condition requiring common carrier offering of transmission service to independent ISPs was prohibited by the Communications Act, it must affirmatively determine the Communications Act's classification of cable

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[1] As the caption indicates, GTE.Net LLC, which is one of the Verizon companies that has filed in support of the petitions here, was a plaintiff in the Section 406 action against Cox. In the district court, "[p]laintiffs argue[d] that the obligations contained in the Act require a common carrier to supply the high-speed cable connection to all requesting ISP's [sic] on nondiscriminatory terms and conditions. *See* 47 U.S.C. §§ 201(a) and (202)(a)." *GTE.Net*, 185 F. Supp. 2d at 1144; *see also MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 364 (4th Cir. 2001) (Verizon urging same proposition). Verizon's position that the Ninth Circuit's reading of the Act is a "gross misinterpretation," Verizon Brief at 1, appears to be recently adopted.

modem service. *Id.* In making that analysis, the court found that:

> Like other ISPs, @Home consists of two elements: a pipeline (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. *However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.*

Id. at 878 (emphasis added). The FCC participated as amicus curiae in *Portland*, but declined to provide the court with its view as to the proper statutory classification of cable modem service. *Id.* at 876.

7. *Portland* was decided in June of 2000. Three months later the Commission issued a notice of inquiry to address the classification and regulatory issues associated with "cable modem service," the name the Commission gave to the bundled offering of broadband transmission and Internet access service. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* 15 F.C.C.R. 19,287 (2000). In March of 2002, the FCC issued a Declaratory Ruling in which it held that "[c]able modem service is not itself and does not include an offering of telecommunications service to subscribers." FCC Pet. App. at 95a. Seven petitions for review were filed in three circuits, including EarthLink's petition filed in the D.C. Circuit. EarthLink's petition challenged the Commission's holding that cable modem service "does not contain an offering of telecommunications service" along with two subsidiary holdings that related directly to the FCC's classification decision. The petitions were consolidated and assigned to the Ninth Circuit by lottery by the Judicial Panel on Multidistrict Litigation.

8. In *Brand X*, the per curiam court held that its reading of the Communications Act in *Portland* controlled its review of the FCC's Declaratory Ruling:

> Our holding in *Mesa Verde*, along with that of the Supreme Court in *Neal*, requires our adherence to the interpretation of the Communications Act we announced in *Portland*. There, we concluded that cable broadband service was not a "cable service" but instead was part "telecommunications service" and part "information service."

FCC Pet. App. at 21a.

Judge O'Scannlain issued a concurrence in which he concluded that "in light of our holding in *Mesa Verde*, we are bound by our own interpretation of the Telecommunications Act in *Portland* and must vacate the FCC's Declaratory Ruling." *Id.* at 22a. He went on, however, to state that:

> [A]dherence to *stare decisis* in the present case—coming as it does in a decision that determines the outcome of seven different petitions for review from three different circuits consolidated and assigned randomly to this court by the Judicial Panel on Multidistrict Litigation—appears to aggrandize, rather than limit our power over an admittedly complicated and highly technical area of telecommunications law.

Id. at 23a-24a (O'Scannlain, J., concurring).

Judge Thomas, the author of the *Portland* decision, also issued a separate concurrence. He explained that he would have reached the same result even if the agency had interpreted the statute before the Ninth Circuit decided *City of Portland*:

> I write separately to underscore my conclusion that *City of Portland* was correctly decided. Considered in its entirety, the 1996 Telecommunications Act compels the

conclusion that cable modem service contains a telecommunications service component.

This is not a case that implicates *Chevron* deference, not only for the reasons noted in our unanimous opinion, but also because it is a question of pure statutory interpretation. In reviewing an administrative agency's construction of the statute it administers, we must consider first "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'"

* * *

In *City of Portland*, we engaged in this analytical exercise and concluded that Congress meant what it said in defining "telecommunications." We did not discern any ambiguity in the statutory meaning for the agency to interpret; thus, *Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*.

Id. at 25a-27a (Thomas, J., concurring) (internal citations omitted).

9. On December 4, 2003, the FCC, without being joined by the United States, filed a petition for rehearing and rehearing en banc. The FCC urged the en banc court to rehear the case in order to apply the test set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The cable industry filed a petition urging the same ground for rehearing. Only Judge O'Scannlain of the panel voted to grant the suggestions for rehearing en banc. The full court was "advised of the petitions for rehearing en banc and no active judge requested a vote on whether to rehear the matters en banc." FCC Pet. App. at 207a. The

petitions for rehearing en banc were denied on March 31, 2004. Thereafter, the Acting Solicitor General requested and obtained two separate extensions of time, until August 30, 2004, in which to petition for certiorari.

10. On December 8, 2003, while the en banc petitions were pending, the Department of Justice, specifically noting the participation of the Office of the Solicitor General, the Federal Bureau of Investigation, and the Drug Enforcement Administration, submitted a letter to the FCC summarizing a meeting among DOJ personnel and FCC personnel. The letter addresses the proper statutory classification of Internet access and its implications for whether the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. §§ 1001 *et seq.*, applies to Internet-based communications. In that letter, DOJ directly contradicted the interpretation now offered to this Court by the government:

> Law Enforcement advanced the theory that Internet access service is a "telecommunications service," or at least contains a "telecommunications service" that implicates the CALEA statute.
>
> * * *
>
> Law Enforcement also stated its belief that the Commission's *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA.

Earthlink Opp. App. at 14a.[2]

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[2] The DOJ's objection to the FCC's ruling that cable modem service is solely an information service arises from the fact that CALEA contains two separate exclusions for providers of "information services." *See* 47 U.S.C. § 1001(8)(C) (excluding from the definition of "telecommunications carrier" "persons or entities insofar as they are engaged in providing information services") *and* 47 U.S.C. § 1002(b)(2)(A) (stating that the intercept capability requirements of CALEA "do not apply to . . . information services"). The operative portions of the definition of

11. On August 9, 2004, the Commission issued a notice of proposed rulemaking in a docket captioned *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 69 Fed. Reg. 56976 (2004). There, the FCC again faced the question of the proper statutory classification of broadband Internet access services. Despite the fact that the FCC held in the Cable Modem Declaratory Ruling that cable modem service is *solely* an information service under the Communications Act, it tentatively concluded in its CALEA proceeding that the same service can *never* be an information service under an identically defined term in CALEA, a statute that predates the Telecommunications Act of 1996 by two years:

> For purposes of the Communications Act, the Commission has concluded that cable modem service is an information service and has tentatively concluded that wireline broadband Internet access is also an information service. Assuming those determinations become final, those services would, nonetheless, have to be evaluated under CALEA's separate definition of "telecommunications carrier" which, as discussed above, is broader than the definition in the Communications Act. Where a service provider is found to fall within CALEA's Substantial Replacement Provision it would be deemed a "telecommunications carrier" for purposes of CALEA to which CALEA obligations would apply. If, at the same time, we interpreted CALEA's Information Services Exclusion to apply, it would present an irreconcilable tension; that is, particular service providers would find themselves at the same time subject to CALEA under the Substantial Replacement Provision and exempted from it by virtue of the Information Services Exclusion. We believe that the better reading of the statute is to

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"information services" in CALEA, 47 U.S.C. § 1001(6), and the definition of "information service" in the Communications Act, 47 U.S.C. § 153(20), are identical. EarthLink Opp. App. at 9a-10a, 1a.

> recognize and give full effect to CALEA's broader definition of "telecommunications carrier" *and to interpret the statute to mean that where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing information services for purposes of CALEA.*

Id. at 56979 (emphasis added).

12. On August 27, 2004, the Acting Solicitor General filed a petition for certiorari on behalf of the United States and the FCC. On August 30, 2004, the cable industry filed its petition. Verizon, BellSouth, and SBC (the "telephone companies") have filed in support of the petitions.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The FCC offers three reasons why the petition should be granted. First, the FCC argues that its conclusion that cable modem service is solely an information service is a permissible construction of the statute that is entitled to deference under step two of *Chevron*. Second, it argues that the Ninth Circuit misconstrued this Court's precedent and exacerbated a circuit conflict relating to the relationship between stare decisis and *Chevron* step-two deferential review. Third, the FCC argues that the classification of cable modem service is an issue of exceptional national importance. The cable industry urges the same grounds, although it presents them in a different order. Although EarthLink's arguments in opposition are stated primarily in terms of the FCC's petition, they apply with equal force to the cable industry's petition and the telephone companies' briefs in support.

The Commission's first two grounds for granting the petition are premised on the assumption that this is a *Chevron* step two case, that is, that there is some ambiguity in the statute through which Congress has delegated authority to the

Commission to fill in the gap. *See Chevron*, 467 U.S. at 843-845. As the per curiam court and Judge Thomas in his concurrence explained in *Brand X*, *see* FCC Pet. App. at 19a, 27a, and as the plain language of the statute itself demonstrates, the premise that the statute is ambiguous is simply wrong. Accordingly, the Commission's first two arguments fail because they depend on a fundamental assumption that is incorrect.

The Commission's final argument is that the classification of the transmission component of cable modem service is a question of exceptional national importance. The question is important, but Congress answered it in 1996 by declaring that the offering of telecommunications to the public for a fee "shall be treated as a common carrier" service. 47 U.S.C. § 153(44). At the same time, Congress provided the Commission with broad authority under Section 10 of the Act to tailor or eliminate common carrier regulations when specific criteria are met. Thus, there is no open legal question that requires this Court's intervention.

The Commission seeks to avoid the definitional language that answers the question presented by redirecting the Court's attention to selective quotations from Section 706 of the Telecommunications Act of 1996 and Sections 230 and 254 of the Communications Act. The Commission itself has held that Section 706 is not an independent grant of authority. Moreover, that section directs the Commission to encourage advanced telecommunications capability by using "price cap regulation, [and] regulatory forbearance," tools applicable only to common carriers. *See* 47 U.S.C. § 157 nt. Section 230 deals with protections for offerors of devices to filter out pornography on the Internet. *See* 47 U.S.C. § 230. It says nothing about the proper application of the core defined terms "information service," "telecommunications," and "telecommunications service." Likewise, Section 254 focuses on the provision of universal service, which Congress defines in

Section 254(c) as an "evolving level of telecommunications service." 47 U.S.C. § 254(c). The Commission concludes its argument regarding national importance by stating that it finds the means specifically provided by Congress for relieving common carriers of unnecessary burdens—Section 10 of the Act—to be inconvenient. That is no reason at all.

ARGUMENT

I. THE STATUTE COMPELS THE CONCLUSION THAT THE "TELECOMMUNICATIONS" COMPONENT OF CABLE MODEM SERVICE IS A "TELECOMMUNICATIONS SERVICE."

Three defined terms in the Communications Act govern the issue presented here: "information service," "telecommunications," and "telecommunications service." *See* EarthLink Opp. App. at 1a-2a.

The parties agree that Internet access is at least in part an "information service." *See* FCC Pet. at 17 ("The Commission had previously concluded that Internet access service 'is appropriately classified as an information service . . . .'"). The parties also agree that, because information service by definition is provided "via telecommunications," there is by definition a "telecommunications" component to Internet access. *See* FCC Pet. at 18 ("The Commission recognized that '[a]ll information services require the use of telecommunications' to enable customers to interact with information.") (alteration in original). The only remaining question is whether the "telecommunications," *see* 47 U.S.C. § 153(43), that the parties agree is a statutory component of information service is also a "telecommunications service." The definition of "telecommunications service" answers that question in the affirmative.

The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be

effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Telecommunications service is thus a subset of telecommunications; it is telecommunications that is offered (1) for a fee, and (2) to the public. There is no contention by any party that cable companies do not charge for cable modem service, or that part of the fee collected does not go to pay for the high-speed transmission that is the capability that induces customers to purchase this service even though dial-up or "narrow-band" service is two to four times cheaper. Nor can there be any doubt that the service is offered "directly to the public." As the FCC points out, "[a]s of December 2003, there were 16.4 million cable modem lines in use," surpassing dial-up connections for the first time. FCC Pet. at 25. The service, of course, is available and marketed to many more people than have actually signed up.

The facts that the service at issue by definition includes "telecommunications," and that the entire service is being offered for a fee to the public, should end the analysis. Both factors that differentiate the admittedly present "telecommunications" from "telecommunications service" have been met, and cable modem service therefore includes a "telecommunications service."

The FCC never conducted the simple, statutorily compelled analysis described above.[3] Instead, the FCC simply decreed that there was an ambiguity, although it never said which words of the relevant definitions were susceptible to more than one reasonable reading.[4] It then proceeded to announce

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[3] As EarthLink argued in the Ninth Circuit, the FCC's failure to apply or even acknowledge the clear two-part test set forth in the statute provides an independent ground for vacating the Declaratory Ruling. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000).

[4] To the extent that the Commission suggests that the lack of a specific reference to "cable modem service" in the statute constitutes an ambiguity, *see* FCC Pet. at 16, the argument is without merit. *See generally U.S.*

its interpretation that the Act does not classify the mass-market transmission service over which broadband Internet access is delivered as a common carrier "telecommunications service."

The Commission now claims that its interpretation should be given *Chevron* step two deference. "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill the gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Especially in light of the fact that under Section 10 of the Act, 47 U.S.C. § 160, Congress *expressly* delegated authority to the FCC to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or a class of telecommunications carriers or telecommunications services," it is a mighty stretch for the FCC to assert that Congress also delegated to the agency the power to decide who is and who is not a common carrier in the first place. It is an even further stretch for the Commission to assert that Congress delegated such a power through its silence.

Common carriage is the organizing principle of the Act, and at least one court of appeals has held that the Commission has limited discretion to say who is and who is not a common carrier. *See National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) ("The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.").

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v. Monsanto, 491 U.S. 600, 608-09 (1989) (failure to mention a particular application of a statutory term "'does not demonstrate ambiguity' in the statute: 'It demonstrates breadth.'" (internal citations omitted)).

This Court, with respect to tariff filing under the Communications Act, ruled that the power of the Commission to "modify" tariff filing requirements under the pre-1996 Communications Act was not a delegation to the FCC to eliminate tariff filing: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994). The concept of common carriage is even more fundamental to the Act than is tariff filing (which the Commission has for many carriers eliminated after 1996 using its Section 10 authority[5]), and the presumption against silent delegations of fundamental policy decisions is therefore at its strongest here. In addition, there is an exception in the Act that proves the rule that it is Congress, not the Commission, that determines who is a common carrier. The definition of "telecommunications carrier" states that such an entity "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, *except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage*." 47 U.S.C. § 153(44) (emphasis added). In short, there is nothing to indicate that Congress intended a silent delegation of the magnitude the Commission suggests.

Turning to the specifics of the FCC's interpretation, the agency makes two arguments in support of its alternative reading. The first is that the telecommunications here involved is not offered as a "separate" or "stand-alone" service. *See* FCC Pet. at 18. The second is that cable modem service providers do not "offer" telecommunications to the public,

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[5] *See, e.g., MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

but instead "use" telecommunications to provide an information service. *Id.* at 19. Neither argument can be squared with the statute.

A. The Communications Act Does Not Require That "Telecommunications" Be Offered on a "Separate" or "Stand-Alone" Basis in Order to Be "Telecommunications Service."

The FCC asserts "that the mere transmission of information does not constitute a 'separate 'telecommunications service'' absent a 'stand-alone offering of transmission for a fee directly to the public.'" FCC Pet. at 18 (internal citations omitted). The most obvious problem with this argument is that the definition of "telecommunications service" does not by its terms require a "separate" offering of telecommunications, and the agency has no power to add words to the statute. *See U.S. v. Calamaro*, 354 U.S. 351, 359 (1957) (agency may not add to the statute "something which is not there").[6] Courts operate under the same constitutional restriction. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) ("[W]e may not add terms or provisions where congress has omitted them"). Moreover, where Congress intended the charging of a separate fee to have some statutory significance, it said so. *See* 47 U.S.C. § 153(48) (defining "telephone toll service" as "telephone service between stations in different exchange areas *for which there is made a separate charge* not included in contracts with subscribers for exchange service.") (emphasis added).

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[6] Verizon takes the art of adding words to the statute to a new level. It states (with the emphasis in Verizon's brief) that: "In order to qualify as a 'telecommunications *service*,' on the other hand, a transmission function must be offered *as a separate service* for a fee to a specified class of users. *Id.* § 153(46) (emphasis added)." Verizon Brief at 9. The combination of the direct citation to the definition and the notation of "emphasis added" is plainly intended to leave the impression that the emphasized words are in the statute. They are not.

In addition to the fact that the statute will not allow the FCC's construction, the FCC has itself consistently rejected the argument that bundling a regulated common carrier service with an unregulated information service somehow renders the common carrier service unregulated. The rule was firmly established before the enactment of the Telecommunications Act of 1996:

> We do not accept Bell Atlantic's argument that basic services used with interstate enhanced services are not subject to interstate tariffing under Title II of the Act. Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree. Enhanced services by definition are services "offered over common carrier transmission facilities." *Since the Computer II regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.*

Filing and Review of Open Network Architecture Plans, 4 F.C.C.R. 1, 141, para. 274 (1988) (footnotes omitted) (emphasis added).[7]

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[7] The reference to "*Computer II*" is to the Commission's proceeding styled *Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980). In *Computer II*, the FCC addressed precisely the question presented here, that is, the proper regulation of information services and the transmission services over which those information services are offered. At the time, the FCC used the term "enhanced services" for what the Act today calls "information services," and it used "basic services" for what the Act today calls "telecommunications services." The Commission has held that Congress

After the passage of the 1996 Act, the FCC reaffirmed, in the context of broadband Internet access service offered over DSL lines, that the fact that the end user receives a bundled offering does not change the fact that the transmission involved is a telecommunications service:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24,012, 24,030, para. 36 (1998).

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adopted the *Computer II* framework in adopting the definitions here at issue:

> The 1996 Act added or modified several of the definitions found in the Communications Act of 1934, including those that apply to "telecommunications," "telecommunications service," "telecommunications carrier," "information service," "telephone exchange service," and "local exchange carrier." In section 623(b)(1) of the Appropriations Act, Congress directed us to review the Commission's interpretation of these definitions, and to explain how those interpretations are consistent with the plain language of the 1996 Act. Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. *Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.*

Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R. 11,501, 11,511, para. 21 (1998) (emphasis added).

The courts have joined the Commission in rejecting the concept that bundling information services with telecommunications services changes the statutory classification of the latter. The consent decree that broke up the Bell System prohibited the Bell Operating Companies ("BOCs") from providing "interexchange telecommunications services." *U.S. v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982). The BOCs later argued in the context of such services that were bundled with an information service "that so long as the interexchange portion of the service is not separately identified to the customers and not separately charged to the customer, it is not offered for hire even though it is bundled in the overall gateway service, which is clearly offered for hire." *U.S. v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990). The court rejected the argument:

> We think appellants urge a rather strained interpretation of the language of the decree. Under their view, interexchange service, no matter how extensive, could be provided by the BOCs by simply packaging that service with some other noninterexchange telecommunications or even nontelecommunications service. That interpretation, it seems rather obvious, would create an enormous loophole in the core restriction of the decree. To be sure, information services, of which the gateway proposal appears to be a variant, may well shortly be removed from the decree's coverage. Nevertheless, when information services are, as here, bundled with leased interexchange lines, the activity is covered by the decree.

Id. (internal citation omitted).

The D.C. Circuit's treatment of the bundling issue is especially relevant here because the definition of "information service" in the consent decree is in all material respects identical to (and in fact served as the basis for) the definition

of that term as added to the Communications Act in 1996.[8] It is reasonable to assume that Congress was aware of the judicial constructions that had been placed on the term "information service" as it was used in the consent decree. *See Garrett v. U.S.*, 471 U.S. 773, 793 (1985) ("Congress is predominantly a lawyer's body . . . and it is appropriate for us to assume our elected representatives . . . know the law.") (citations omitted).

B. The FCC's Distinction Between "Offering" and "Using" Telecommunications Defies Common Sense and Has No Legal Significance.

The Commission's second argument, that cable companies "use" rather than "offer" telecommunications to their subscribers, *see* FCC Pet. at 16, is entirely dependent on, and in fact is merely a restatement of, the argument that bundling a telecommunications service with an information service changes the statutory classification of the telecommunications service. The Commission itself makes it clear that it views its "use" argument as simply the logical conclusion of its bundling argument: "*Focusing on the 'single, integrated information service* that the subscriber to cable modem service receives,' the Commission concluded that the cable operator 'is not offering telecommunications services to the end user, but rather is merely using telecommunications to provide end

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[8] Under the consent decree:

> "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include the use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

U.S. v. AT&T, 552 F. Supp. 131, 229 (D.D.C. 1982); *see also* H.R. REP. NO. 104-458 at 115-16 (1995), *reprinted in* 1996 U.S.C.C.A.N. 126-27.

users with cable modem service.'" FCC Pet. at 19 (emphasis added).

Even if the "use" argument could somehow stand on its own, it is nonsensical. It requires no technical expertise to recognize that the reason that consumers are willing to pay more for cable modem service than for dial-up or even DSL service is that the transmission speeds are faster. *See* NCTA Pet. at 4 (cable modem "speeds more than twenty times faster than dial-up"). The very basis of the bargain between the cable modem customer and the cable modem provider is that the customer pays a premium for faster transmission.

Under these circumstances, it defies common sense and the ordinary meaning of the words involved to say that the cable company is not "offering" the transmission to the customer. Indeed, if the cable company is not offering the transmission, from whom does the customer obtain the transmission that he is using and, most relevant under the definition of "telecommunications service," for which he has paid? As Judge Thomas said in his concurrence in *Brand X*, "[u]nder the FCC's approach, the general public would be purchasing a service that nobody offered." FCC Pet. App. at 31a.

The "use" versus "offer" distinction also conflicts with the statute in a more technical respect. "Telecommunications" does not include all transmission, only "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Thus, it matters whose information is being sent, and who directs the sending.

When an Internet subscriber participates in an on-line auction, posts a message to an electronic bulletin board, or sends an email, it is that subscriber, and nobody else, who determines what information is sent, and where. The Commission below agreed with EarthLink that this is the case,

stating that: "As EarthLink comments, the majority of the information accessed over the Internet is chosen individually by the Internet user without the involvement of the cable operator. . . ." FCC Pet. App. at 129a. The fact that the end user controls the information flow during use of an information service is the reason the definition of information service speaks in terms of capabilities provided via "telecommunications" as opposed to via the much broader "communication by wire or radio" found in Section 2 of the Act. *See* 47 U.S.C. § 152.

If the FCC were correct that it is the cable company that is "using" the transmission associated with its cable modem service, that transmission would not be "telecommunications" under the Act, because the cable company does not choose what information is sent, or where that information goes. Under the FCC's reading, cable modem service would cease to include an "information service" (the one part of the classification that the parties agree upon), because it would no longer be provided "via telecommunications," but instead would involve transmission that did not meet the "telecommunications" definition.[9] Thus, the Commission's interpretation, which is based on avoidance of the plain two-part test in the definition of "telecommunications service" and the addition of the qualifier "stand-alone" to that definition, fails both a plain language reading of the statute and also a more technical parsing of the relevant definitions.

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[9] The information control component of the term "telecommunications" also addresses Verizon's suggestion that Congress' inclusion of the definition of "telecommunications" is superfluous under *Brand X*. *See* Verizon Brief at 24-25.

II. THIS CASE DOES NOT IMPLICATE ANY CIRCUIT CONFLICT THAT MAY EXIST REGARDING THE RELATIONSHIP BETWEEN *CHEVRON* AND STARE DECISIS.

The FCC's second argument consists of a tepid suggestion that *Brand X* exacerbates an existing conflict among the circuits regarding the relationship of prior three-judge panel decisions and later-enacted agency rules that conflict with those decisions. FCC Pet. at 19-20. This case presents no such conflict. Whereas the *Brand X / Portland* rulings were based upon the clear meaning of the statute,[10] the case most relied on by the Commission, *Satellite Broadcasting & Communications Association of America v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994), held that the Eleventh Circuit's earlier decision was not based "upon the statute's 'clear meaning,' but rather upon inferences drawn from the statutory scheme and upon our policy determination . . . ."[11] Thus, the case relied on by the FCC as being in conflict with the rule in the Ninth Circuit deals with the statutory interpretation issue presented in a *Chevron* step two analysis, that is, where there is an ambiguity to be resolved by the agency. In contrast, the Ninth Circuit's decision in *Portland* was based upon a plain meaning analysis that was equivalent

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[10] The *Brand X* per curiam decision stated that "while we never explicitly stated in *Portland* that our interpretation was the only one possible, we never said the relevant provisions of the Act were ambiguous." FCC Pet. App. at 19a. In his concurrence, Judge Thomas went further, stating that "the statutory definitions, combined with the overall regulatory and legislative context, compel the result that cable modem service includes a telecommunications service component." *Id.* at 39a.

[11] The Eleventh Circuit in *Satellite Broadcasting* made it clear with respect to its prior precedent, *NBC v. Satellite Broacast Networks*, 940 F.2d 1467 (11th Cir. 1991) ("SBN"), that "[b]ecause we did not address the 'clear meaning' of § 111(f) in SBN, this circuit is not precluded from revisiting our initial interpretation of the regulatory scheme in SBN." *Satellite Broadcasting*, 17 F.3d at 348.

to a *Chevron* step-one analysis. The *Brand X* outcome, therefore, is entirely consistent with the Eleventh Circuit's indication that a precedent based on the clear meaning of the statute would be preserved.

In addition to the fact that this case presents no conflict, petitioners ignore the ability of an en banc court to overrule prior precedent as may be necessary to avoid any unintended or inappropriate results from the application of the general rule that one three-judge panel may not overrule another. Here, of course, other than one panel member's vote in favor of the suggestions for rehearing en banc, no active member of the Ninth Circuit requested a vote on those petitions. FCC Pet. App. at 206a-207a.

The FCC's assertion that *Neal v. United States*, 516 U.S. 284 (1996), does not support the appeals court's conclusion is both irrelevant and incorrect. The *Brand X* panel relied first and foremost on the Ninth Circuit's en banc decision in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 601 (9th Cir. 1988). *See* FCC Pet. App. at 19a ("*Mesa Verde's* requirements are not met in this instance and *Portland's* construction of the Communications Act remains binding precedent within this circuit"). The panel then indicated that "[w]e find further support for this conclusion in the Supreme Court's holding in *Neal v. United States*. . . ." *Id.* *Neal* was thus merely an alternative or supporting basis for the *Brand X* decision. In any case, because the Ninth Circuit did not view the statute as ambiguous either time that it addressed it, the relationship between *Neal* and *Chevron* step two is not implicated by either *Portland* or *Brand X*. The Commission urges that "*Neal* is thus best viewed as addressing a statute with a clear and unambiguous meaning . . . ." FCC Pet. at 22. That is this case.

III. THE FCC'S POLICY ARGUMENTS IN FAVOR OF GRANTING THE PETITIONS MISSTATE THE IMPACT OF THE DECISION BELOW AND CONFLICT WITH THE ACT AND THE COMMISSION'S OWN RULINGS.

The FCC urges that Section 706 of the Telecommunications Act of 1996 somehow compels it, in order to encourage broadband deployment, to refuse to acknowledge that broadband transmission can be a common carrier service. Setting aside that broadband is, by the Commission's own estimation, already deployed in all but the most rural parts of the country, *see Availability of Advanced Telecomms. Capacity in the United States*, FCC 04-208, Fourth Report to Congress at 30 (Sept. 9, 2004), the Commission itself has held that Section 706[12] does not constitute a grant of independent regulatory authority:

> After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706 does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a),[13] to encourage deployment of advanced services.

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[12] The full text of Section 706 is set forth in the appendix to this brief at 10a-11a.

[13] It is significant that the Commission has itself held that Section 706 directs the use of Section 10 forbearance to fulfill its objectives, because Section 10 only authorizes the Commission to forbear from applying regulations and provisions of the Act as they apply to telecommunications carriers and telecommunications services. If cable modem service providers are not telecommunications carriers, then Section 10, and by extension Section 706, does not apply. Moreover, Section 706(a) begins with an exhortation to "[t]he Commission and each State commission with

Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24,012, 24,044, para. 69 (1998) (footnote added).

The FCC also selectively quotes Section 230 of the Communications Act, 47 U.S.C. § 230, for the proposition that everything associated with the Internet should be "unfettered by Federal and State regulation." FCC Pet. at 24. The Commission sets forth what it calls the "pertinent parts" of the text of Section 230 in its appendix. FCC Pet. App. at 210a. An examination of the full text of the section, EarthLink Opp. App. at 5a-9a, reveals that Section 230 has nothing to do with whether a given transmission service is a telecommunications service, but instead deals with liability for transmitting the speech of others and with protections for service providers that offer technologies for blocking obscene or harassing material.

The FCC also suggests that the Ninth Circuit's decision would subject cable modem service providers to common carrier regulation with respect to the information service component of cable modem service. *See* FCC Pet. at 24-25 ("Unlike telecommunications and cable service providers, which are subject to extensive regulatory obligations under the Communications Act, information service providers operate in a largely unregulated environment . . . ."). To the extent that the FCC is suggesting that the entire cable modem service would be classified as a telecommunications service, that is clearly incorrect. The holding in *Portland* and *Brand X* was that only the transmission component of the service is a telecommunications service. The computer services that ride over that transmission service would remain classified as information services and would thus be unregulated.

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regulatory authority over *telecommunications services* . . . ." 47 U.S.C. § 157 nt (emphasis added).

The FCC argues that allowing the Ninth Circuit's decision to stand would prevent the Commission from "developing a 'rational framework for regulation of competing services' that is 'consistent across multiple platforms.'" FCC Pet. at 27, quoting FCC Pet. App. at 48a. To the contrary, *overturning* that decision would leave the Commission essentially powerless to regulate the transmission over which mass-market Internet access services are offered. This is the case because the Act states that a telecommunications carrier shall be treated as a common carrier "*only* to the extent that it is engaged in providing telecommunications services . . . ." 47 U.S.C. § 153(44) (emphasis added).

It is one thing for the Commission to remove regulation through the mechanism set by Congress, Section 10 of the Act. It is quite another for the Commission to interpret the statute so as to strip the Commission of all power to enforce common carrier obligations with respect to a set of services that are poised to replace the existing communications system. Acceptance of *that* result, and not the result reached by the court of appeals, would "stop[] a vitally important policy debate in its tracks . . . ." FCC Pet. App. at 23a, quoting *Brand X* (O'Scannlain, J., concurring). That this would be the result of accepting the FCC's position demonstrates that the Commission's reading of the statute would be unreasonable even in the event that *Chevron* step two were the proper standard of review, which it is not.

The Commission's final argument is that its forbearance authority under Section 10 of the Act, 47 U.S.C. § 160, is an inadequate tool to remove any unnecessary regulations, largely because such proceedings would be "time-consuming and hotly contested . . . ." FCC Pet. at 28. The Commission's broad Section 10 authority was put in place by Congress to allow the Commission to relieve from common carrier regulation any "telecommunications carrier or telecommunications service, or class of telecommunications carriers or

telecommunications services," should the service or carrier meet the test established by Congress. 47 U.S.C. § 160(a). Both the courts and the Commission are not only bound by Congress' purpose, but also by the "means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994). If the FCC finds its Section 10 authority unwieldy, that is an issue for Congress, not for this Court.

CONCLUSION

The FCC's reading of the statute ignores the simple two-part test that determines when "telecommunications" becomes "telecommunications service." That reading would allow common carriers to escape regulation simply by combining transmission services with information services, and it would effectively remove the agency from the regulatory landscape with respect to what is rapidly becoming the most ubiquitous and popular form of telecommunications in history. That reading of the statute is impermissible under any standard of review, and the Ninth Circuit was correct in saying so. There is no issue here that warrants this Court's intervention, and the petitions should be denied.

Respectfully submitted,

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